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TAGS: EINV ETRD ECON EFIN PREL BR
SUBJECT: BRAZIL:INVESTMENT AND SERVICES DIRECTOR COSTA

Ref A: Brasilia 2174 Ref B: Brasilia 2177

¶1. (U) Ronaldo Costa Filho, division head for Services and Investment, discussed bilateral and intra-Mercosul investment negotiations, as well as WTO services negotiations in a recent meeting with EconCouns. CAMEX (External Trade Chamber) has recently approved a new BIT parameters proposal intended to address Congressional concerns. Negotiators are instructed to attempt to re-negotiate the Mercosul investment protocol and seek new bilateral investment agreements. However, Ministers expressed a strong preference that investment agreements should be negotiated within the framework of a full FTA. END SUMMARY

Bilateral Investment Treaties

¶2. (U) Costa noted that, in 2002, the executive branch withdrew the signed BITs it had sent forward for Congressional ratification. (NOTE: over the period 1994-1999, Brazil signed BITs with Belgium/Luxembourg, Chile, Cuba, Denmark, Finland, France, Germany, Italy, Korea, Netherlands, Portugal, Switzerland, United Kingdom and Venezuela. Not all were ever sent to Congress. Brazil was also the only Mercosul member that never ratified the intra-Mercosul investment protocol it had signed). The government took this action when it became clear that Congress would never approve the BITs, as key members believed they violate the Brazilian constitution and treated foreign investors better than Brazilian investors.

¶3. (U) Congressional members' concerns included: 1) Dispute resolution between an investor and the State: strong concerns regarding clauses allowing an investor to seek resolution of investment disputes via international arbitration. Congressmen have argued that international arbitration would undermine the principle of sovereignty of the State. (Note: a 2001 Federal Supreme Court ruling established that the 1996 Brazilian Arbitration Act, which permits international arbitration subject to Federal Supreme Court ratification of arbitration decisions, is not unconstitutional). They also argued that, since no domestic investors can challenge the Brazilian State in an international court, giving that right to foreign investors would give them an unfair advantage over domestic investors; and 2) Clauses mandating that compensation for expropriations should be paid directly in convertible currencies: This clause is considered to be in violation of Article 184 of the Brazilian Constitution, which says that the State can expropriate rural properties for agrarian reform and pay compensation with "agrarian reform bonds" redeemed over a period of 20 years. (Note: other sources have mentioned Congressional concerns regarding lack of capital movement controls and also concerns that, as a developing country Brazil should not have to grant national treatment to foreign investors. However, Costa did not mention these as key

current concerns).

NEW BRAZILIAN BIT PRINCIPLES

¶4. (SBU) Subsequently, according to Costa, in consultation with Congress, three interministerial working groups have been working over the past year to develop an investment agreement proposal that would satisfy Congressional concerns. The final proposal was submitted to CAMEX - a Minister-level body, including MDIC, MRE, Finance, Planning, Agriculture, and Casa Civil (Dilma Rousseff), responsible for the formulation of external trade policy - a couple of months ago. CAMEX has now approved this proposal and instructed negotiators to attempt to re-negotiate the internal Mercosul investment protocol on this basis (Costa noted that investment tends to be a fraught conversation intra-Mercosul, as Paraguay and Uruguay are convinced that Argentina and Brazil unfairly court investment via incentives, to their disadvantage). In addition, CAMEX instructed negotiators to consider other countries as potential partners for bilateral investment agreement negotiations under the newly approved parameters. However, CAMEX guidance issued a strong preference to negotiate investment agreements only/only as part of a full FTA rather than as stand-alone agreements, according to Costa.

¶5. (SBU) Saying the document was internal, Costa declined to share either the CAMEX-approved investment negotiating principles or to articulate orally the provisions that now would satisfy Congress. Post will continue efforts to obtain the text or a detailed explanation of its provisions (Post notes, per Ref B and septel on recent Mercosul Department head meeting, Brazil intends to offer Mexico FTA negotiations that are anticipated to include an investment chapter. We may in the near future be able to obtain

details via this channel as well).

FTAs

¶6. (U) Following Lula's recent trip to South Africa, Itamaraty is now in the internal planning stages of a proposal to merge the India and the SACU "FTA" negotiations into one combined Mercosul FTA negotiation that would include services and investment chapters (see ref A). Costa noted that under the Mercosul/Chile agreement, "98%" of trade is moving duty-free, services negotiations are at an advanced stage, but no investment negotiations have begun ("but we are talking about it."). He noted that the stalled EU and GCC FTA negotiations include services and investment.

WTO Services

¶7. (SBU) Costa reiterated that Brazil does not believe a Chairman's text is needed for services and offers can be tabled without a new text. While Brazil is willing to work from a text "within certain parameters," Brazil's concern is "our perception that the US and EU are trying to add new objectives to Hong Kong. It is not constructive to reopen this debate." He asserted Brazil is not a major demandeur in services and indicated frustration in trying to motivate the Brazilian business community to engage in the negotiations; "particularly disappointing is construction, because we are competitive, but the private sector is not interested in the WTO." He noted his IT services sector is just starting to become interested in the WTO. Costa said the CNC (national confederation of services associations) has not been very active. He indicated that Brazil is simply waiting to see what it will have to give on services to help close a good agriculture package. He added, "If you (USG) were happy, I'd be worried I had gone too far, too early. Happiness should come at the end."

¶8. (SBU) COMMENT: Costa is a lively and engaging interlocutor, clearly expert in his subject and a canny MRE player. In December,

he defends his required thesis (which concludes that preferential trade agreements are too important politically for countries ever to agree to banish them) in order to qualify for promotion to the Brazilian Senior Foreign Service. He recently lost the Financial Affairs segment of his office with the creation of a new Financial Coordination Office (Luis Antonio Balduino - no staff yet) responsible for World Bank, IMF and tax treaty issues. We will seek specifics of the new Brazilian investment negotiation parameters. We note the upcoming Economic Dialogue may also provide an opportunity to encourage Brazil to articulate its revised goals for investment agreements. END COMMENT

SOBEL